SUPREME COURT
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In the Supreme Court of the United States

OCTOBER TERM, 1973

74-269

No. A-1293

DR. EARL W. BRIAN, SECRETARY, HUMAN RELATIONS AGENCY, et al.,

Petitioners,

vs.

CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al.,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

EVELLE J. YOUNGER
Attorney General of the State of California

ELIZABETH PALMER
Assistant Attorney General

N. EUGENE HILL
Deputy Attorney General

JOHN FOURT
Deputy Attorney General

Attorneys for Petitioners

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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In the Supreme Court of the United States

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DR. EARL W. BRIAN, SECRETARY, HUMAN RELATIONS AGENCY, et al.,
Petitioners,

vs.

CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of California

Comes now petitioner Secretary of Health and Welfare, State of California, and petitioner Director of Benefit Payments, State of California, and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of California entered in this proceeding on April 16, 1974.

OPINION BELOW

The judgment and opinion of the Supreme Court of the State of California appears as Appendix A hereto and is reported at 11 Cal.3d 237, 520 P.2d 970 (1974).

JURISDICTION

The judgment and opinion of the Supreme Court of the State of California was entered on April 16, 1974. No rehearing in that Court was requested. Mr. Justice Douglas, pursuant to 28 U.S.C. 2101(c), has extended petitioner's time for the filing of this petition to and including September 13, 1974. Appendix B hereto. This petition for certiorari was filed before that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). Review is sought of a state court decision which invalidated a state departmental administrative regulation which applied to all AFDC recipient children. As an exercise of the state's law-making power, the regulation in question comes within the meaning of "state statute" as used by Congress in 28 U.S.C. 1257(3). See *Hamilton v. Regents,* 293 U.S. 245, 258 (1934); *Northern Pacific v. Dept. of Public Works,* 268 U.S. 39, 42 (1924).

QUESTION PRESENTED

Congress in enacting the AFDC provisions of the Social Security Act of 1935, as amended, requires that the amount of assistance paid by a state be based on the amount needed in the individual case after other income and resources are considered. 42 U.S.C. 602(a)(7). California promulgated welfare regulations which reduced AFDC grants by the value of housing and utility needs shared with an adult aid recipient. The question presented is whether the decision of the Supreme Court of the State of California invalidating this regulation bring the state's welfare laws into conflict with federal law?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 42:

"Section 602(a) A state plan for aid and services to needy families with children must . . . (7) . . . pro-

vide that the state agency shall, in determining need, take into consideration any other income and *resources* of any child or relative claiming aid to families with dependent children, ..." (Emphasis added.)

STATEMENT OF THE CASE

Respondents are California Welfare Rights Organization, an association composed of AFDC welfare recipients, and Jacklyn Jo Shelton, an AFDC recipient. Petitioners are Earl W. Brian, former Secretary of Health and Welfare, State of California, now succeeded by James E. Jenkins, Secretary of Health and Welfare, State of California, and Robert B. Carleson, former Director of Social Welfare, State of California, now succeeded by David B. Swoap, Director of Benefit Payments, State of California. Respondents filed their action for extraordinary relief directly in the Court of Appeal of California, Third Appellate District, to have a certain AFDC welfare regulation declared invalid. Following decision in the Court of Appeal, the Supreme Court of the State of California granted discretionary hearing and entered its judgment and opinion which held the regulations in question invalid on the ground that it conflicted with state law.

The petitioners in the Court of Appeal of the State of California (where respondents filed their original suit), and in the Supreme Court of the State of California, contended that the state court decision erroneously brought the state's welfare laws into conflict with federal law. It was argued that 42 U.S.C. 602(a)(7) and 45 C.F.R. 233.20 (a)(ii)(a) required them to consider the value of housing, utilities, food and clothing which are provided by the mother to the unborn child in determining AFDC eligibility and the amount of aid to be paid to the family. Excerpts from the petitioners' briefs in the Court of Appeal of the

State of California and in the Supreme Court of the State of California are set forth in Appendix C hereto.

Since the children's pro rata expenditure for housing and utilities ($70.00) is less than the value of housing and utility needs provided in a maximum aid payment ($101.00), the AFDC grant to the children was reduced by $31.00. This amount represents the value of the in-kind income to the children resulting from their sharing of housing and utility needs with an adult aid recipient.

In reliance on what it assumed federal law required, California issued administrative regulations which recognized the fetus as a person for AFDC eligibility and grant computation purposes as soon as pregnancy is confirmed. Regulation 44-213.31,[1] Appendix D hereto. See *Burns v. Alcala*, unpublished, CA 8th, March 29, 1974, pet. cert. docketed 73-1595; 42 U.S.C. 606(a), October Term 1973; Appendix E hereto. Under California section 11450 (Appendix F),[2] AFDC payments are computed by a formula which takes into consideration nonexempt income, and size of family,

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1. California Department of Benefit Payments, Public Social Services Regulation, 44-213.31.

2. Unless otherwise indicated, all section references are to the California Welfare and Institutions Code.

The section 11450 schedule of benefits, adjusted for cost of living are:

Size of FBU	Maximum Aid
1	$129
2	212
3	262
4	311
5	355
6	400
7	438
8	477
9	516
10 or more	554

Regulation 44-315.41, Appendix G hereto.

i.e., a pregnant AFDC applicant would count as two persons. Her cash grant plus nonexempt income would total $212.00. A pregnant AFDC recipient with one child would count as three persons whose cash grant plus nonexempt income would total $262.00. California also adopted, pursuant to its view of federal requirements, regulation 44-115.952 (Appendix H hereto) which provided:

> "When an unborn child is included in the FBU [Family Budget Unit], the in-kind deduction [from the AFDC grant] shall be the total of the amounts by which the in-kind values for housing, utilities, food and clothing are increased as a result of including the unborn in the FBU."[3]

In the case of a pregnant recipient with two children, regulation 44-115.95 has the following effect. Prior to becoming pregnant, her three-person family would receive $262.00, less nonexempt income. Upon becoming pregnant, her four-person family would receive $311.00, less nonexempt income, calculated as follows:

Maximum aid	$311.00
Less In-Kind Income to Unborn[4]	40.00
	$271.00
Plus Maximum Special Diet Allowance[5]	9.00
	$280.00

3. Pursuant to the writ of mandate issued in April 1974, by the Supreme Court of the State of California, regulation 44-115.95 was repealed effective June 17, 1974. Regulation revision #2067, effective 6/17/74.

4. Regulation 44.115.9, Appendix J hereto.

Housing	$ 6.00
Utilities	2.00
Food	22.00
Clothing	10.00
	$40.00

5. Regulation 44.265.212, Appendix K hereto.

Absent the $40.00 in-kind income deduction, the four-person family in question would receive $311.00, less nonexempt income. Regulation 44-315.41.

The Supreme Court of California held regulation 44-115.95 inconsistent with state law inasmuch as the value of the resources provided by the pregnant recipient to the fetus was not intended by the California Legislature to constitute countable "income" to the fetus.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW ERRONEOUSLY BRINGS CALIFORNIA WELFARE LAW INTO CONFLICT WITH THE OBJECTIVES OF CONGRESS

The AFDC program is based on a scheme of cooperative federalism. *King v. Smith,* 392 U.S. 309, 316 (1968). State participation in the program is not required at the cost of losing federal funds. As long as a state is receiving federal funds, however, it is under a legal requirement to comply with the federal conditions placed on the receipt of those funds. *Rosado v. Wyman,* 397 U.S. 397, 408 (1970); *Townsend v. Swank,* 404 U.S. 282, 286 (1971).

In administering AFDC programs, state agencies are required in determining need, to "... take into consideration any other income and resources of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7).[6] Under HEW regulations, all AFDC plans must specify a state wide standard of need. Both eligibility for AFDC assistance, and the amount of the aid to be paid, are based on a comparison of the "standard of need" with the income and resources available to the applicant or

6. A state AFDC plan must "provide that the state agency shall, in determining need, take into consideration any other income and *resources* of any child . . . claiming aid to families with dependent children, ..." 42 U.S.C. 602(a)(7). (Emphasis added.)

recipient. 45 C.F.R. 233.20(a)(3)(ii)(a).[7] This Court, after noting the language of 42 U.S.C. 602(a)(7) and of the applicable federal regulation, stated:

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered. (Emphasis in original text; footnote omitted.) Congress has been careful to ensure that *all* of the income and resources properly attributable to a particular applicant be taken into account, and this individualized approach has been reflected in the implementing regulations." *Shea v. Vialpando*, ... U.S. ....., ... (1974).

Neither the federal statute nor regulations define "resources" as used in 42 U.S.C. 602(a)(7). Yet in the related Supplemental Security Income (SSI) program, Congress recognized that the provision of housing, support, and maintenance by a non-aid recipient to an SSI recipient constitutes a resource having value which acts to reduce the SSI aid otherwise payable. Thus 42 U.S.C. 1382(a)(2)(A) provides:

> ". . . that in the case of any individual (and his eligible spouse, if any) living in another person's household and receiving support and maintenance in kind from such person, the dollar amounts otherwise applicable to such individual (and spouse) . . . shall be reduced by 33⅓ percent in lieu of including such support and maintenance in the unearned income of such individual (and spouse) as otherwise required by this subparagraph; . . ."

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7. "A state plan for . . . AFDC . . . must . . . [p]rovide that, in establishing financial eligibility and the amount of assistance payment . . . [a]ll income and *resources* . . . will be considered in relation to the state's standard of assistance . . ." 45 C.F.R. 233.20(a)(3)(ii)(a). (Emphasis added.) Appendix I hereto.

Similarly, the pregnant mother provides housing, support, and maintenance "resources" to her unborn child. A newborn baby, if furnished ample housing, utilities, food, and clothing "resources" would not have a "need" for these items under 42 U.S.C. 602(a)(7). Because, the unborn child has these resources made available to him by his mother he does not have a "need" for these items under 42 U.S.C. 602(a)(7). The "needs" of the unborn are substantially less than those of children in being. This difference can validly be measured as equivalent to the value of the resources provided by the mother to her unborn child. The value of these resources under 42 U.S.C. 602(a)(7) must therefore be subtracted by the state from the grant otherwise paid on behalf of the unborn child.

It follows that the decision below erroneously construed state welfare law so as to cause it to come into conflict with paramount federal law.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of California in this cause.

Respectfully submitted,

EVELLE J. YOUNGER
Attorney General of the State of California

ELIZABETH PALMER
Assistant Attorney General

N. EUGENE HILL
Deputy Attorney General

JOHN FOURT
Deputy Attorney General

Attorneys for Petitioners

(Appendices follow)

Appendix A

Supreme Court Filed Apr 16 1974

In the Supreme Court of the State of California
in Bank
SAC. 7984

California Welfare Rights Organization et al.,
Petitioners,

v.

Earl W. Brian, as Secretary, etc., et al.,
Respondents.

Jacklyn Jo Shelton et al.,
Petitioners,

v.

The Superior Court of Shasta County,
Respondent;
Marian Babiarz, as Director, etc., et al.,
Real Parties in Interest.

In these consolidated cases, certain welfare recipients have challenged the validity, under federal and state law, of welfare regulations issued by the State Department of Social Welfare, which regulations affect the assistance grant to pregnant mothers. We have concluded that the regulations at issue are invalid because they purport to consider, contrary to the probable intent of federal and state law, that the mother's body constitutes a "resource" of the fetus, the

economic value of which "resource" may be deducted from the assistance grant otherwise payable to the mother upon pregnancy.

Petitioner California Welfare Rights Organization (CWRO) is an unincorporated association, representing recipients of aid to families with dependent children (AFDC); this petitioner brought an original action in the Court of Appeal seeking mandamus against respondents Brian (Secretary of the California Health and Welfare Agency) and Carleson (former Director of Department of Social Welfare). Petitioner Shelton, a resident of Shasta County and a recipient of AFDC aid originally brought a class action against Babiarz, the Director of the Shasta County Welfare Department, and respondent Carleson, seeking prohibition to restrain enforcement of the regulations in issue. The trial court denied a preliminary injunction and entered an order which, in effect, permitted the Department to continue to implement its regulations. Petitioner Shelton thereupon joined petitioner CWRO in its action in the Court of Appeal, requesting mandamus against respondents Brian and Carleson, and further sought to prohibit further proceedings in the Shasta County action. The Court of Appeal denied the consolidated petition, and petitioners ask this court to review the matter.

Eligibility for AFDC aid is determined by reference to a table, set forth in section 11452 of the Welfare and Institutions Code, which establishes certain "minimum basic standards of adequate care" depending upon the number of needy persons in the same family. Notwithstanding the amounts set forth in section 11452, however, actual aid payments are limited by another table, set forth in section 11450, which establishes certain "maximum aid" payments, depending upon the number of eligible needy persons in the same home.

Under section 11450, the size of the grant is reduced by any nonexempt "income" of the aid recipient.

The instant case concerns the validity of a regulation promulgated by the Department which purports to determine the existence of, and measure the extent of, an AFDC recipient's "income" to be deducted from his grant under section 11450. The regulation before us attempts to assess the value to an unborn child of the comforts he receives in his mother's womb. We think that, in the absence of express federal or state provisions on the subject, the instant regulation stretches the existing statutory concept of "income" or "resources" beyond the probable intent underlying those terms.

Initially, the parties do not dispute that AFDC assistance properly may be paid to pregnant mothers on behalf of their unborn children. Although the federal Social Security Act (42 U.S.C. § 601 et seq.) is silent on the question, providing for aid to dependent or needy "children" deprived of parental support, or to the relatives who care for them (see *id.*, § 606), regulations promulgated by the Department of Health, Education and Welfare (HEW) seem to permit (but not require) the states to provide for AFDC aid, with federal participation, to or on behalf of unborn children. HEW's regulations provide that "federal financial participation is available in . . . [p]ayments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis . . . ." (45 C.F.R. § 233.90, subd. (c), subsec. (2)(ii).) As this language is contained in a subsection of section 233.90 entitled "federal financial participation" rather than in preceding subsections entitled "State plan requirement" or "Condition for plan approval," it seems probable that under federal law, AFDC payments to pregnant mothers on behalf of their unborn children are permissive, not mandatory. In other words, the states may

elect to treat the unborn as other dependent, needy children in administering their AFDC plans.[1]

California has elected to include unborn children in its AFDC plan. Although the applicable statutes refer generally to "needy child" or "children" (see Welf. & Inst. Code, §§ 11202, 11250), the Department has, as early as 1949, interpreted these terms as including unborn children, *and has provided that AFDC aid shall be paid in the event of pregnancy, although in a lesser amount than were the unborn child considered to be an additional member of the family unit.* For example, under former Regulation 44-212.62, a family's "need amount" used for determining the size of the assistance payment was increased $21 monthly upon verification of pregnancy. This regulation remained in effect until 1971, when new regulations were promulgated following the passage of the Welfare Reform Act of 1971. The Department's long-standing administrative practice of providing aid to, *or on behalf of,* the unborn child may, in the absence of any legislative intent to the contrary, be deemed approved by the Legislature and representative of existing state law. (See, e.g., Pearson v. State Social Welfare Board, 54 Cal.2d 184, 210; City of Los Angeles v. Rancho Homes, Inc., 40 Cal.2d 764, 770-771; Coca-Cola Co. v. State Bd. of Equalization, 25 Cal.2d 918, 921.)[2]

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1. Accord Parks v. Harden, ... F.Supp. ....., [41 L.Week 2391]; contra, Alcala v. Burns, ... F.Supp. ....., [42 L.Week 2109]; Doe v. Lukhard, ... F.Supp. ....., [42 L.Week 2179]; Wilson v. Weaver, ... F.Supp. ....., [41 L.Week 2664]. Evidently, only 19 states thus far have elected to provide additional AFDC benefits upon pregnancy.

2. Petitioners point out that, on four prior occasions (and as late as 1971) bills have been introduced to amend the Welfare and Institutions Code to expressly provide that the term "needy child" shall not include an unborn child. Each of these bills died in committee without reaching a vote; one such proposed bill resulted from the recommendation contained in a special committee report to the 1951 Legislature. Thus, we may reasonably assume that the Legisla-

Following the passage of the Welfare Reform Act (which was silent regarding the subject of aid to the unborn), the Department adopted two new regulations. Regulation 44-213.31 provides that, for purposes of AFDC aid, the unborn child shall be considered to be a needy person eligible for aid (without specifying the precise amount of aid to be paid on his behalf). If this regulation were the sole provision on the subject of grants to unborn children, its effect would be to require payment to a pregnant mother without income the full maximum grant otherwise specified for a family of two needy "persons" under section 11450 of the Welfare and Institutions Code.

However, the second regulation, Regulation 44-115.95, would substantially reduce the grant specified under section 11450. Acting solely in reliance upon federal and state provisions which authorize a grant reduction by the amount of nonexempt "income" or "resources" available to the AFDC recipient (see 42 U.S.C. § 602, subd. (a), subsec. (7); 45 C.F.R. § 233.20, subd. (a), subsec. (3)(ii)(c); Welf. & Inst. Code, §§ 11450, 11008), the Department sought to recognize and measure the value *to the fetus* of the "resources" (called "in-kind income" by the regulation) furnished it by the mother, in the form of reduced needs for food, clothing and shelter.

First, Regulation 44-115.9 (not directly challenged in this case) sets forth the Department's estimated "in-kind income" value of particular need items—for example, a value of $76 monthly is specified for "housing" for a family unit consisting of two persons, and $83 monthly for a unit of

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ture has been aware of the Department's administrative construction of the statutory provisions. Its failure to act to modify that construction is indicative of an intent to preserve benefits for unborn children. (See Coca-Cola Co. v. State Bd. of Equalization, *supra*, 25 Cal.2d 918, 922-923; Cal. State Employees Assn. v. Trustees of Cal. State Colleges, 237 Cal.App.2d 530, 536-537.)

three persons. The challenged regulation (44-115.95) provides that "When an unborn child is included in the FBU [family budget unit], the in-kind deduction [from the AFDC grant] shall be the total of the amounts by which the in-kind values for housing, utilities, food and clothing [Reg. 44-115.9] are increased as a result of including the unborn in the FBU." Since the in-kind value of housing for a three-person FBU is $83, the in-kind housing deduction would be $7 for a family consisting of a pregnant mother, her child in being, and her unborn child.

In petitioner Shelton's case, the application of Regulation 44-115.95 results in a substantial reduction in the grant which her family would otherwise receive. Prior to her pregnancy, her three-person family was entitled to a maximum grant of $235 per month (Welf. & Inst. Code, § 11450), less nonexempt "income." If, as required by Regulation 44-213.31, her unborn child were considered to be a "person," her family would receive the $280 maximum grant specified for a four-person family. Yet, under Regulation 44-115.95, her unborn child is deemed to receive "in-kind income" in the total amount of $35. Thus, in net effect, the Shelton family would receive an additional $10 monthly as a result of the pregnancy.[3]

It is well established that administrative regulations must conform to applicable legislative provisions, and that an administrative agency has no discretion to exceed the authority conferred upon it by statute. (California Welfare Rights Organization v. Carleson, 4 Cal.3d 445, 455; Morris v. Williams, 67 Cal.2d 733, 737.) In the instant case, the Department is charged with establishing regulations "not in conflict with the law" fixing statewide standards for

3. The Department's regulations (Reg. 44-265.212) also provide for an additional special diet allowance of $9 maximum per month for pregnant mothers.

the administration of all state or federally assisted aid programs. (Welf. & Inst. Code, § 10604, subd. (b).) We must determine, then, whether Regulation 44-115.95, and its concept of retail "in-kind income," conflicts with state or federal law.

As we have seen, the state AFDC plan contemplates that aid is to be paid to a needy family in accordance with a schedule of maximum grants, depending upon the number of eligible needy persons in the family. (Welf. & Inst. Code, § 11450.) *Since, by virtue of a long-standing departmental practice which we deem to be approved by the Legislature, an unborn child is considered to be eligible for AFDC assistance,* the Department's sole authority for making a deduction from the AFDC grant specified in section 11450 for each eligible recipient would be that there exists "income" or "resources" which may, under federal and state provisions cited above, be taken into account. None of these provisions, however, defines these terms; the state provision simply refers to "income" as including "the value of currently used resources." (Welf. & Inst. Code, § 11008.)

We do not believe it to be probable that the Legislature, in using the general terms "income" and "resources" intended those terms to be employed to exclude, or reduce the AFDC grant to, unborn children. In essence, the additional AFDC grant is really made to the mother, not her unborn child, for the present and future needs arising from pregnancy. Seen in this light, it would be anomalous to hold that the pregnancy generates "income" or "resources" of benefit to anyone, mother or child. We do not mean to suggest that the Legislature could not properly consider the question whether, from a standpoint of policy, the grant to pregnant mothers should be terminated or reduced. In view of the apparent lack of federal guidelines

on the matter, that question would appear to remain a matter of state legislative policy. *Yet the applicable statutes, as we construe them, disclose no intent to treat the unborn any differently than other children. Given the long-standing policy in this state to provide aid on behalf of the unborn child, we conclude that such a child is entitled to be treated as any other "person" for purposes of computing AFDC aid under section 11450.*

We conclude that the following relief prayed for by petitioners should be granted: (1) Let a writ of prohibition issue restraining further proceedings by respondent Superior Court of Shasta County to enforce Regulation 44-115.95; (2) Let a writ of mandate issue ordering respondents Earl W. Brian and David B. Swoap to rescind Regulation 44-115.95 in its entirety.

BURKE, J.

WE CONCUR:
WRIGHT, C. J.
McCOMB, J.
MOSK, J.
CLARK, J.
DEVINE, J.*
MOLINARI, J.*

*Assigned by the Chairman of the Judicial Council

Appendix B

Supreme Court of the United States

No. A-1293

Dr. Earl W. Brian, Secretary, Human Relations Agency, et al.,

Petitioners,

v.

California Welfare Rights Organization, et al.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 13, 1974

/s/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States

Dated this 11th
day of July, 1974

Appendix C

Court of Appeal of the State of California
for the Third Appellate District

3 CIV. 13628

California Welfare Rights Organization, an unincorporated association; Catherine Jermany, as President, California Welfare Rights Organization; Jacklyn Jo Shelton, individually, and on behalf of all others similarly situated,

Petitioners,

vs.

Dr. Earl W. Brian, M.D., Secretary, Human Relations Agency; Robert B. Carleson, Director, Department of Social Welfare, State of California,

Respondents.

Jacklyn Jo Shelton, individually, and on behalf of all others similarly situated,

Petitioners,

vs.

Superior Court of the State of California in and for the County of Shasta,

Respondent,

and

Marian Babiarz, Director, Shasta County Welfare Department; Robert B. Carleson, Director, Department of Social Welfare, State of California,

Real Parties in Interest.

POINTS AND AUTHORITIES IN SUPPORT OF RETURN TO ORDER TO SHOW CAUSE

EVELLE J. YOUNGER, Attorney
General of the State of California
ELIZABETH PALMER, Assistant
Attorney General
N. EUGENE HILL, Deputy Attorney
General
RAYMOND M. MOMBOISSE, Deputy
Attorney General
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-4574
Attorneys for Respondents

III. THE DIRECTOR OF THE DEPARTMENT OF SOCIAL WELFARE IS REQUIRED TO AND HAS ESTABLISHED LEGAL STANDARDS FOR EVALUATING IN-KIND INCOME

Section 602(a)(7) of the U.S.C. Title 42 provides that the state agency shall, in determining need, take into consideration any other income and resources of any child, relative or any other individual living in the same home as such child and relative whose needs the state determines should be considered in determining the need of the child.

Section 233.20(a)(3)(ii)(a) of 45 C.F.R. mandates that in establishing financial eligibility and the amount of the assistance payment that all income and resources will be considered and will first be applied to maintenance costs.

Section 233.20(a)(4)(i) of Title 45 of the C.F.R. requires that all income must be considered such as social security or other benefits, earnings or contributions from relatives.

The state is required to comply with these mandatory requirements by the Act, as interpreted and implemented by

regulations promulgated by HEW. *King v. Smith,* 392 U.S. 309, 316-317 [20 L.Ed.2d 1118, 1125-1126, 88 S.Ct. 2128]; *County of Alameda v. Carleson,* 5 Cal.3d 730, 738 (1971); *Calif. Welfare Rights Organization v. Carleson,* 4 Cal.3d 445, 448-449.

Thus under federal law the State is obligated to adopt reasonable methods for ascertaining the resources available to any child claiming AFDC eligibility.

When that income is in money there is no problem attributing value to it. But, when it is in the form of an in-kind income, i.e., when it is in goods or services, its worth must be established. The responsibility for fixing standards for the evaluation of such in-kind income resides in the Director of the Department of Social Welfare.

The Director of the Department of Social Welfare is authorized to "adopt regulations, orders, or standards of general application to implement, interpret, or make specific the law enforced by the department, . . ." (Welf. & Inst. Code § 10554.)

Welfare and Institutions Code section 11452 specifically empowers the department to establish rules and regulations assuring the uniform application statewide of the provisions relating to minimum basic standards.

Welfare and Institutions Code section 11008 in part states:

> "In computing the amount of income determined to be available to support a recipient, the value of currently used resources shall be included. . . ."

Pursuant to this federal and state mandate to establish the value of currently used resources the Director adopted section 44-115.95 of the Public Social Service Manual.

It provides:

> "When an unborn child is included in the FBU, [AFDC Family Budget Unit] the in-kind deduction shall be the

total of the amounts by which the above in-kind values for housing, utilities, food and clothing are increased as a result of including the unborn in the FBU."

The in-kind values are set forth in EAS 44-115.9 through 44-115.94 (Exhibit #1).

Let us consider how this regulation applies. We will use petitioner Shelton as our example. Their FBU consists of Mr. and Mrs. Shelton, who are between 20 and 35 years of age, and one child between 1 and 3 years of age. Prior to the new pregnancy they received a maximum grant of $235. When the new living and separately existing member is added the maximum grant will be increased to $280 to satisfy the increased needs of that person for food, housing, utilities, and clothing.

In the case of the unborn, who has not as yet become a separate existing member of the unit, there are no such needs. Its mother's body supplies it with shelter, clothing and food. This constitutes "satisfied needs" and thus is a "currently used resource" or "in-kind income."

The currently used resource's value is computed as follows:

	FBU of 3	FBU of 4	Difference
Housing	$81	$ 86	$ 5
Utilities	$14	$ 15	$ 1
Food	$83	$103	$20
Clothing	$ 9 per person		$ 9
			$35

This "currently used resource" or "in-kind income" of $35 is subtracted from the maximum grant of $280. The result, $245 is the payment to the FBU which now includes the unborn child. This is $10 more than that unit received prior to the addition of the unborn. But in addition the

mother may receive $9 for special diet. Mrs. Shelton has not applied for nor does she receive such an allowance. She is given all necessary medical care.

Thus the welfare family will receive at least $10 more than it did before the unborn was conceived, and in all probability $19 more than previously. Further the family receives $92 in food stamps which are redeemable at face value for food. The cost of said stamps varies. In the case of the Sheltons in September they cost $52—for a bonus of $40 in free stamps.

The Sheltons had a total grant in September of $255 in cash (the difference of $10 is due to the Welfare Department's staying of its compliance with the new regulation because of this litigation. But the figure is only $10 more than the $245 they should have received under the new regulations, so for purposes of illustration can be here used). They received $92 in food stamps for which they paid $52. Their total value welfare income in September was $295.

The needs of the Shelton family for food according to the standards of the United States Department of Agriculture are:

	Low Cost Plan	Moderate Cost Plan	Liberal Plan
Family of two, 20 to 35 years	$ 19.50	$ 23.60	$ 29.40
Child 1 to 3 years	4.80	5.80	6.90
Plus pregnancy allowance	1.50	1.60	1.70
Weekly Total	$ 25.80	$ 31.00	$ 38.00
Monthly Total	$110.94	$133.30	$153.40

Thus the Shelton family had $184.06 for expenses other than food, if we used the low cost plan for an adequate diet, which is that usually applied in welfare cases. Even applying the liberal plan which "is for families who want and

can afford greater variety, more meats and fruits and vegetables, than the other plans allow", they had $141.60 to cover other expenses.

This regulation is not only imminently fair and reasonable but, further, the presumption is that the Director has properly interpreted the legislative mandate and adopted a regulation reasonably necessary to effectuate the purposes of the statute. *Ralphs Grocery v. Reimel,* 69 Cal.2d 172. Given the statutory mandate from both federal and state law to deduct the value of resources from a grant, it cannot be said that the regulation is contrary to the federal law.

For, as the United States Supreme Court recently held in *Jefferson v. Hackney,* .... U.S. ...., 32 L.Ed.2d 285, 92 S.Ct. 1724 (1972), it is not the function of the courts to strike the proper balance between competing policy consideration. Indeed, the court put it even stronger when it held:

> "In conclusion, we re-emphasize what the Court said in *Dandridge v. Williams,* 397 U.S., at 487:
>
> "'We do not decide today that the [state law] is wise, that it best fulfills the relevant social and economic objectives that [the State] might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.... [T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.'"

In the Supreme Court of the State of California

No. 3 Civ 13628

California Welfare Rights Organization, et al.,
Petitioners,

vs.

Dr. Earl W. Brian, M.D., et al.,
Respondents.

Jacklyn Jo Shelton, et al.,
Petitioners,

vs.

Superior Court of the State of California in and for the County of Shasta,
Respondent,

and

Marian Babiarz, et al.,
Real Parties in Interest.

ANSWER TO PETITION FOR HEARING AND REPLY TO AMICI CURIAE

EVELLE J. YOUNGER
Attorney General
ELIZABETH PALMER
Assistant Attorney General
N. EUGENE HILL
Deputy Attorney General
500 Wells Fargo Bank Building
Fifth Street and Capitol Mall
Sacramento, California 95814
Telephone: (916) 445-5963

Attorneys for Respondents and Real Parties in Interest

B. FEDERAL LAW REQUIRES THAT STATE'S PARTICIPATION IN THE AFDC PROGRAM INCLUDE CONSIDERATION OF RESOURCES.

It is well recognized that the state's participation in the AFDC program is contingent upon meeting federal requirements. *Jefferson v. Hackney,* 406 U.S. 535 (1972); *California Welfare Rights Organization v. Carleson,* 4 Cal.3d 445 (1971); *County of Alameda v. Carleson,* 5 Cal.3d 730 (1971). Federal requirements are set forth in the Social Security Act and the implementing regulations of the Secretary of Health, Education and Welfare.

42 U.S.C. 602(a)(7) provides that the state agency shall, in determining need, take into consideration any other income and resources of any child, relative or any other individual living in the same home as such child and relative whose needs the state determines should be considered in determining the need of the child.

The regulations adopted by the Secretary of Health, Education and Welfare mandate the consideration of resources of an eligible child in establishing the amount of assistance payment. 45 C.F.R. 233.20(a)(3)(ii)(a). That section states:

> "(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs."

As a condition to the continuation of federal grants, state plans must meet federal requirements. The State of California is required to comply with these mandatory requirements of the Social Security Act, as interpreted and implemented by regulations promulgated by the Secretary of

the Department of Health, Education and Welfare. *King v. Smith,* 392 U.S. 309, 316-317 (1968) [20 L.Ed.2d 1118, 1125-1126, 88 S.Ct. 2128]; *Villa v. Hall,* 6 Cal.3d 227, 236 (1971), *vacated* and *remanded,* 406 U.S. 965; 7 Cal.3d 926 (1972); *County of Alameda v. Carleson,* 5 Cal.3d 730, 738 (1971), *appeal dismissed,* 406 U.S. 913; *California Welfare Rights Organization v. Carleson, supra,* 4 Cal.3d 445, 448-449 (1971); *Pearson v. State Social Welfare Board,* 54 Cal.2d 184 (1960).

As this Court stated in *Pearson* in considering the federally assisted categorical aid program for old age security:

> "The state assistance programs involve federal subsidies and they are subject to reasonable federal regulations. (*Cf. Ivanhoe Irr. Dist. v. All Persons,* 53 Cal.2d 692, 713-714 [3 Cal.Rptr. 317, 350 P.2d 69]; *County of Marin v. Superior Court,* 53 Cal.2d 633, 640-641 [2 Cal.Rptr. 758, 349 P.2d 526].) Under both the federal and state acts administrative boards are empowered to promulgate rules, regulations and administrative interpretations. These regulations should be harmonized wherever possible, within the statutory limits established, in order to carry out the cooperative public purpose and law of both sovereigns." *Pearson v. State Social Welfare Board, supra,* 215.

That case held that under both the California and Federal Old Age Security Acts consideration of income and resources was required in determining need. *Pearson v. State Social Welfare Board, supra,* 54 Cal.2d 184, 215-216 (1960).

As Justice Tobriner stated for the Court of Appeal:

> "In view of the federal statute requiring a state to consider 'other income and resources' in determining need, and the subsequent federal ruling that a wife's OASI benefits constitute 'resources' in the circumstance that his wife is an 'essential person' to an applicant, the regulation is no more than a necessary condition to compliance with federal law.

"We turn to respondent's second point: his assertion that the trial court properly concluded that 'promulgation of Section A-212.53 by the . . . Board . . . was an act in excess of the authority delegated to said Board by the legislature . . . .' We shall explain why the board possessed the authority to adopt the regulation in execution of the purposes of the state legislation.

"Section 103 of the Welfare and Institutions Code gives the Social Welfare Board the power and the duty 'to adopt, repeal and amend *such* rules and regulations *which are* consistent with law and *reasonably necessary* for the administration of welfare.' Section 103.1 further states that such rules and regulations 'are adopted to implement, interpret, or make specific the law enforced by the department [Department of Social Welfare] . . . .' Section 2140 authorizes the board to administer the old age security law. These sections clearly endow the board with the power to adopt regulations requisite to compliance with federal law." *Cox v. Social Welfare Bd.*, 193 Cal.App.2d 708, 715-716 (1961).

The same conclusion follows in considering resources in AFDC, also a categorical aid program under the Social Security Act. Federal law mandates that the state plan contain elements to consider such resources in determining the amount of the grant. 45 C.F.R. 232.20(a)(3)(ii)(a).

Appendix D

STANDARDS OF ASSISTANCE

NEED

44-213 (Cont.) Regulations

AFDC

44-213 THE FAMILY BUDGET UNIT (Continued) 44-213

.3 *Needy Persons Living in The Home Who Shall Be Included As "Recipients" In The Same Family Budget Unit, Unless EXCLUDED By Section 44-213.5*

.31 *Children*

All related eligible unmarried children, including the unborn child, for whom aid is requested by the child's parent or relative caretaker. A child receiving restricted income (Section 44-101.2), otherwise eligible, shall, at the option of the parent or relative caretaker requesting aid, be included in or excluded from the Family Budget Unit, with his income.

Appendix E

APPENDIX A

United States Court of Appeals
for the Eighth Circuit
NO. 73-1595

Linda Alcala, Individually and on behalf of all other persons similarly situated,

Appellee,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Jane Doe and Joan Roe,

Appellees,

v.

Kevin J. Burns, Individually and in his capacity as Acting Commissioner of the State of Iowa Department of Social Services; and

Michael Ryan, Individually and in his capacity as Director of the Scott County Department of Social Services,

Appellants.

Appeal from the United States District Court for the Southern District of Iowa.

Submitted: January 15, 1974
Filed: March 29, 1974

Before MATTHES, Senior Circuit Judge, HEANEY, Circuit Judge, and TALBOT SMITH, Senior District Judge.*

MATTHES, Senior Circuit Judge.

This appeal presents the question, much litigated in the district courts recently, whether an unborn child is a "dependent child" within the meaning of § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), thus entitling the expectant mother to receive Aid to Families with Dependent Children (AFDC).

Defendants-appellants, Kevin J. Burns, Acting Commissioner of the State of Iowa Department of Social Services, and Michael Ryan, Director of the Scott County Department of Social Services, acting pursuant to their interpretation of the Employees Manual of the Iowa Department of Social Services, denied such assistance to plaintiffs-appellees, who at the time of application were pregnant and who admittedly would become eligible for benefits once their children were born. Upon denial of benefits, plaintiffs brought this class action in the United States District Court for the Southern District of Iowa charging that defendants' actions violated the Equal Protection and Due Process Clauses of the United States Constitution, and, because inconsistent with § 406(a) of the Social Security Act, 42

*Hon. Talbot Smith, Senior District Judge, Eastern District of Michigan, sitting by designation.

U.S.C. § 606(a), also violated the Supremacy Clause. Plaintiffs sought declaratory and injunctive relief, and monetary damages for assistance wrongfully withheld.

Following a hearing, the district court filed findings of fact and conclusions of law, *Alcala v. Burns*, 362 F.Supp. 180 (S.D. Iowa 1973). Formal judgment was entered adjudging invalid defendants' denial of AFDC payments to plaintiffs and permanently enjoining defendants from further denying AFDC payments to pregnant women who are otherwise qualified for such payments. Defendants have appealed.

I.

As a preliminary matter, we wish to clarify the basis for jurisdiction in the district court, although no question as to jurisdiction has been raised by the parties on appeal. *See United States v. Redstone*, 488 F.2d 300, 301 (8th Cir. 1973); *Williams v. Rogers*, 449 F.2d 513, 517 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). As was the case in *Doe v. Lukhard*, ... F.2d ..... (4th Cir., Feb. 26, 1974), to our knowledge the initial circuit case to decide the "unborn child" question, plaintiffs here alleged a colorable claim of denial of equal protection within the scope of § 1983 and its jurisdictional counterpart, § 1343 (3), and, accordingly, the district court possessed pendent jurisdiction of the Supremacy Clause claim. Further, whether or not a three-judge court would have been required to determine the constitutionality of defendants' interpretation of the welfare manual, *see Doe v. Lukhard, supra* at n.4, a three-judge court is clearly not required to determine whether that interpretation conflicts with the Social Security Act. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

II.

The Social Security Act requires that "aid to families with dependent children * * * be furnished * * * to all eligible individuals * * *." 42 U.S.C. § 602(a)(10).

A triad of Supreme Court cases "establishes that, at least in the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." *Townsend v. Swank,* 404 U.S. 282, 286 (1971). *See King v. Smith,* 392 U.S. 309 (1968); *Carleson v. Remillard,* 406 U.S. 598 (1972).

If the *King, Townsend* and *Remillard* cases are to govern, it must first be determined that unborn children are "eligible," that is, that they are "dependent children" within the protection of the Act. On this point the courts have differed. Three district courts have ruled that an unborn child is not a "dependent child." *Mixon v. Keller,* No. 74-111-Civ-J-T (M.D. Fla., March 1, 1974); *Murrow v. Clifford,* Civ. No. 114-73 (D.N.J., June 12, 1973); *Parks v. Harden,* 354 F.Supp. 620 (N.D. Ga. 1973) (appeal pending Fifth Circuit). One circuit court and twelve districts courts, including the court below, have decided that an unborn child is a "dependent child." *Doe v. Lukhard, supra, aff'g* 363 F.Supp. 823 (E.D. Va. 1973); *Wisdom v. Norton,* Civ. No. 15906 (D. Conn., Jan. 3, 1974); *Stuart v. Canary,* No. C 72-452 (N.D. Ohio, Dec. 27, 1973); *Whitfield v. Minter,* 368 F.Supp. 798 (D. Mass. 1973); *Carver v. Hooker,* Civ. No. 73-87 (D. N.H., Nov. 30, 1973); *Tapia v. Vowell,* Civ. No. 73-B-169 (S.D. Texas, Nov. 14, 1973) (Preliminary injunction granted pending decision of *Parks v. Harden* by the Fifth Circuit); *Tillman v. Endsley,* No. 73-1476-Civ-CF (S.D. Fla., Oct. 1,

1973); *Jones v. Graham,* Civ. No. 73-L-235 (D.Neb., Sept. 5, 1973); *Green v. Stanton,* 364 F.Supp. 123 (N.D. Ind. 1973); *Harris v. Mississippi State Dept. of Public Welfare,* 363 F.Supp. 1293 (N.D. Miss. 1973); *Alcala v. Burns, supra; Wilson v. Weaver,* 358 F.Supp. 1147 (N.D. Ill. 1972). Courts on both sides of the question have looked to the plain meaning of the word "child" and reached opposite results. The Act itself and the legislative history are unhelpful. Of some note are the Department of Health, Education and Welfare (HEW) regulations implementing the Act which provide: "Federal financial participation is available in: * * * (ii) Payments with respect to an unborn child when the fact of pregnancy has been determined by medical diagnosis * * *." 45 C.F.R. § 233.90(c)(2). The regulations further provide: "Federal financial participation * * * is available in any expenses incurred in establishing eligibility for AFDC, including expenses incident to obtaining necessary information to determine the existence of * * * pregnancy of a mother." 45 C.F.R. § 233.90(c)(3). HEW, however, takes the position that these regulations merely extend an option to the state of including unborn children within its plan and do not mandate such coverage. In fact, as of 1971, 18 states and the District of Columbia furnished AFDC benefits to unborn children, while 34 states and Puerto Rico did not. Brief for HEW as Amicus Curiae, Appendix B, *Murrow v. Clifford, supra.*

We seriously question the right of HEW, as opposed to the unquestioned right of Congress, to decide what benefits are optional. Clearly Congress possesses, and has exercised in the past, the power to give individual states an option to exclude children eligible under the federal standards. *See Townsend v. Swank, supra* at 287-89 and n.5. But there is no indication that Congress has so acted with respect to unborn children.

We ask, as did the district court, from whence can HEW have derived the authority to bestow benefits, albeit supposedly optional benefits, upon unborn children if not from the eligibility provisions of the Social Security Act? We are inclined, in this respect, to accord substantial weight to HEW's understanding, implicit in the regulations, that unborn children are eligible. On the other hand, we are not permitted to defer to the agency's practice of making benefits to eligible persons optional. *Townsend v. Swank, supra* at 286.

We believe that the district court correctly concluded that the term "dependent child" is broad enough to encompass an unborn child and that such coverage is consistent with the purposes of the Social Security Act. The *King, Townsend* and *Remillard* cases, then, determine that defendants' interpretation of the welfare manual, denying benefits to unborn children and their mothers, violates the Supremacy Clause and is invalid.

III.

Although granting declaratory and injunctive relief, the district court refused to order retroactive payment of benefits, citing our case of *Doe v. Gillman,* 479 F.2d 646, 649 (8th Cir. 1973), *petition for cert. filed sub nom. Burns v. Doe,* 42 U.S.L.W. 3205 (U.S. Nov. 5, 1973) (No. 73-406), which avoided deciding whether the Eleventh Amendment prohibits retroactive payments by presuming that the Iowa welfare officials would follow their own regulations which, in the court's view, provided for retroactive payments. Now appellants request this court to decide directly the Eleventh Amendment question. We have already done so in *Anderson v. Graham,* .... F.2d .... (8th Cir., Dec. 20, 1973), holding

that "the Eleventh Amendment deprives the federal court of jurisdiction to award a money judgment against the State for * * * retroactive [AFDC] payments * * *."

The judgment of the district court is affirmed.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX A-1

The District Court opinion and judgment is reported at 362 F.Supp. 180 (S.D. Ia. 1973). The Order, as originally filed, misquoted the Social Security Act. The Court underscored and misquoted the crucial word "prenatal" for the correct word "parental". [Title 42 U.S.C. § 601] A correcting order was filed after Notice of Appeal was filed and prior to publication in the Federal Reporter.

Appendix F

§ 11450. Table of amount of aid: Increases or decreases commensurate with federal contributions: Payment for children receiving "foster care": Special needs allowances

(a) For each needy family which includes one or more needy children qualified for aid under this chapter, except as provided in Section 11403, there shall be paid, notwithstanding minimum basic standards of adequate care established by the department under Section 11452, an amount of aid each month which when added to his income, exclusive of any amounts considered exempt as income or paid pursuant to subdivision (d) of this section or Section 11453.1, is equal to the sums specified in the following table, as adjusted for cost-of-living increases or decreases pursuant to Section 11453:

Number of eligible needy persons in the same home	Maximum aid
1	$117
2	192
3	237
4	282
5	322
6	362
7	397
8	432
9	467
10 or more	502

If, when and during such times as the United States government increases or decreases its contributions in assistance of needy children in this state above or below the amount paid on July 1, 1972, the amounts specified in the above table shall be increased or decreased by an amount equal to such increase or decrease by the United States

government, provided that no such increase or decrease shall be subject to subsequent adjustment pursuant to Section 11453.

(b) For children receiving foster care who are qualified for aid under the provisions of this chapter, except as provided in Section 11403, there shall be paid the sum necessary for the adequate care of each child, but not to exceed in any month the product of one hundred twenty dollars ($120) multiplied by the number of children in each county receiving foster care. The state shall pay 67.5 percent and the county shall pay 32.5 percent of the aid furnished for the adequate care of such children.

(c) As used in this chapter, "foster care" means care in a boarding home or institution.

(d) (1) In addition to the amounts payable under subdivision (a) of this section and Section 11453.1, a family shall be entitled to receive an allowance for recurring special needs not common to a majority of recipients. The county shall pay the full cost of the additional aid furnished needy families pursuant to this subdivision after first deducting therefrom any funds received from the federal government. Such recurring special needs shall include but not be limited to special diets upon the recommendation of a physician, and unusual costs of transportation, laundry, housekeeping service, telephone, and utilities not to exceed the minimum basic standards of adequate care.

(2) A family shall also be entitled to receive an allowance, at county expense after first deducting therefrom any funds received from the federal government, for nonrecurring special needs caused by sudden and unusual circumstances beyond the control of the needy family; provided, however, that such needs shall not be taken into consideration in determining the eligibility of the family for aid.

(3) The department shall establsh rules and regulations assuring the uniform application statewide of the provisions of this subdivision.

(e) Except for the purposes of Section 15200, the amounts payable to recipients pursuant to Section 11453.1 shall not constitute part of the payment schedule set forth in subdivision (a) of this section.

The amounts payable to recipients pursuant to Section 11453.1 shall not constitute income to recipients of aid under this section.

Amended Calif. Stats 1973-74 ch 75 § 1, effective May 31, 1973 operative June 1, 1973.

Appendix G
ASSISTANCE GRANTS
AID PAYMENTS

Regulations 44-315 (Cont.)

Determining Amount of Grant—Child Living With Parent or Relative

44-315.41 *Child Living With Parent or Relative (Basic Cash Grant)*

Calculate the amount of the basic cash grant as follows:

.411 Based on the size of the FBU (see Section 44-213.3) find the maximum aid in the following table:

Size of FBU	Maximum Aid
1	$129
2	212
3	262
4	311
5	355
6	400
7	438
8	477
9	516
10 or more	554

Appendix H

STANDARDS OF ASSISTANCE
INCOME

44-115 (Cont.) Regulations

44-115.952 In all other cases where an unborn child is included in the FBU, the in-kind deduction shall be the total of the amounts by which the above in-kind values for housing, utilities, food and clothing are increased as a result of including the unborn in the FBU.

Appendix I

45 C.F.R. 233.20(a)(3)(ii)

"(a) Requirements for State Plans. A State Plan for . . . AFDC . . . must, as specified below:

"(3) Income and resources; . . . AFDC . . .

"(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (a) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance costs; (b) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered; . . ."

Appendix J

STANDARDS OF ASSISTANCE
INCOME

Regulations 44-115 (Cont.)

44-115 EVALUATION OF INCOME IN KIND (Continued) 44-115

.9 For purposes of this section, the following shall be considered as the in-kind income value of certain items of need for an FBU:

.91 *Housing*

a. one-person FBU—$61/per month
b. two-person FBU—$82/per month
c. three-person FBU—$89/per month
d. four-person or larger FBU—$95/per month

.92 *Utilities (including telephone)*

a. one-person FBU—$13/per month
b. two-person FBU—$14/per month
c. three-person FBU—$15/per month
d. four-person or larger FBU—$17/per month

.93 *Food*

a. one-person FBU—$34/per month
b. two-person FBU—$74/per month
c. three-person FBU—$93/per month
d. four-person FBU—$115/per month
e. five-person FBU—$139/per month
f. six-person FBU—$162/per month
g. seven-person FBU—$179/per month
h. eight-person FBU—$197/per month
i. nine-person FBU—$215/per month
j. ten-person or larger FBU—$232/per month

.94 *Clothing*

a. one-person FBU—$10/per month
b. two-person FBU—$20/per month
c. three-person FBU—$30/per month

d. four-person FBU—$40/per month
e. five-person FBU—$50/per month
f. six-person FBU—$60/per month
g. seven-person FBU—$70/per month
h. eight-person FBU—$80/per month
i. nine-person FBU—$90/per month
j. ten-person or larger FBU—$101/per month

Appendix K

STANDARDS OF ASSISTANCE NEED

44-265 (Cont.) Regulations

44-265

.212 The special need allowance for a therapeutic diet shall be limited to the following types and maximums:

$15 maximum for one of the following diets:

Diabetic, 2200 calories or more
High caloric—high protein (including special formula for infant)
Lactation (while breast feeding)

$ 9 maximum for one of the following diets:

Diabetic, under 2200 calories
Bland
Low fat—cholesterol
Low salt (sodium, under 3 grams)
Pregnancy

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In the

Supreme Court of the United States

October Term, 1974

No. 74-269

Dr. Earl W. Brian, etc., et al.,

Petitioners,

vs.

California Welfare Rights Organization, et al.,

Respondents.

Brief of Amici Curiae in Opposition to Petition for Writ of Certiorari

CALIFORNIA ASSN. FOR THE RETARDED
CALIFORNIA CHILDREN'S LOBBY
N.A.S.W.
CALIFORNIA FEDERATION OF TEACHERS
CALIFORNIA HUMAN SERVICES ORGANIZATION
CALIFORNIA N.O.W.
CALIFORNIA NUTRITION ACTION COMMITTEE
CALIFORNIA NUTRITION COUNCIL
S.F. CATHOLIC SOCIAL SERVICES
CHILDREN'S FOUNDATION
FOOD ADVOCATES
DREW HEALTH RIGHTS PROJECT
FRIENDS COMMITTEE ON LEGISLATION
LIASION COMMITTEE FOR CHILD CARE
L.A. COUNCIL OF JEWISH WOMEN
SACRAMENTO Y.W.C.A.
SOCIAL SERVICES UNION, LOCAL 535
SOCIETY FOR NUTRITION EDUCATION
YOUTH LAW CENTER.

INTEREST OF THE AMICI*

The California Association for the Retarded is a 16,000 member organization concerned with problems of the mentally retarded. The *Association's* membership is composed of parents and friends of the retarded, as well as

*Pursuant to Rule 42, this brief is filed with the consent of all parties. The letters of consent have been filed with the Clerk of the Court.

professionals involved with the prevention and treatment of mental retardation.

The California Children's Lobby is a legislative lobby dedicated to providing a voice for California's children in the halls of government.

The California Council, National Association of Social Workers represents over 6,000 professional social workers in public and private service agencies.

The California Federation of Teachers, AFT, AFL-CIO is the statewide affiliate of the American Federation of Teachers, AFL-CIO, composed of 225 constituent California locals representing teachers in public and private education.

California Human Services Organization, Inc. is a voluntary organization of persons employed in public and private social agencies.

California N.O.W., which represents 47 California chapters of the *National Organization for Women,* is a nonpartisan human rights organization.

California Nutrition Action Committee is a coalition of voluntary organizations dedicated to ending hunger and malnutrition.

California Nutrition Council, is composed of nutrition leaders representing public and private state agencies who seek to prevent and alleviate nutrition problems.

Catholic Social Service of San Francisco is a family service of the Catholic Archdiocese of San Francisco.

The Children's Foundation is a nationwide organization providing technical assistance and information on problems of childhood.

Food Advocates is a federally-funded resource and advocacy project within the Department of Nutritional Sciences, College of Natural Resources, University of California, Berkeley.

The Drew Health Rights Project of the Charles R. Drew Post-graduate Medical School, Los Angeles, California, is an advocacy program for low-income health care consumers in California.

The Friends Committee on Legislation is a Quaker-sponsored organization of 4,000 members concerned with basic human rights.

The Liaison Committee for Child Care Centers in Higher Education represents some 350 campuses of institutions of higher education interested in child care.

The Los Angeles Section, National Council of Jewish Women, is a 3,400 member organization dedicated to furthering human welfare.

The Sacramento Young Women's Christian Association shares in the YWCA's concern that all people be assured equal opportunities.

Social Service Union, Local 535, SEIU, AFL-CIO is a 6,000 member labor organization of social workers.

Society for Nutrition Education is a group of professional nutrition educators.

The Youth Law Center is a federally funded program promoting juvenile law reform.

Amici represent an exceptionally broad spectrum of public and private organizations directly concerned with all aspects of child health, welfare and education in California.

Amici believe that the California Supreme Court has correctly resolved the legal issues posed in this matter. Amici presented the California Supreme Court with nutritional and medical evidence pertinent to the human issues posed by petitioners' practices. Because Amici wish this Court to be fully informed as to the specious scientific basis for petitioners' "in-kind income" claims, they submit this opposition to the petition for writ of certiorari.

ARGUMENT

Amici adopt respondents' statement of facts with the admonition that the statement is written in an extremely reserved manner considering the mental and physical jeopardy in which petitioners' practices placed the pregnant mothers and their fetuses during the period EAS § 44-115.9 was in effect.[1]

Studies by the United States Department of Agriculture show that as income decreases relative to fixed costs, the proportion of families unable to meet recommended dietary allowances increases. That is, as income is reduced, it becomes more difficult, if not impossible, to provide adequate nutrition. (USDA, *Household Consumption Studies,* 1965.) Companion studies have shown that as income, after fixed expenses, increases, the quality of the diet improves.

The implications for pregnancy due to the grant reductions occasioned by petitioners' regulations are ominous.

A substantial body of literature indicates a particularly high risk of an unfavorable pregnancy outcome among the impoverished. Petitioners' regulations reducing recipients' AFDC grant levels even further, had the effect of exposing them to grievous risk.

Impoverished pregnancies have three to five times the incidence of abnormally low weight of the infant at birth than is likely to occur in pregnancies which take place under more favorable circumstances. State Department of Public Health, Bureau of Vital Statistics, *Vital Statistics of California,* 1965-1966-1967; U.S. Department of Health, Education and Welfare, Public Health Service, *Vital Statistics of the U.S., 1965,* Vol. 2; Silverman, W.A. and J.C. Sinclair, "Current Concepts: Infants of Low Birth Weight," 274 *New England Journal of Medicine,* 448-450 (1966). The

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1. Respondents' Consolidated Brief in Opposition to Petitions For Certiorari, Nos. 74-269, 74-311, and 74-312, at pp. 8-10.

under-weight children of nutritionally inadequate pregnancies are prone to suffer the additional risks of hyaline membrane disease, neonatal hypoglycemia, mental retardation and other complications. Infants born of such pregnancies have a markedly higher incidence of infant mortality than other babies. Maternal mortality and maternal complications such as hemorrhage and toxemias are also more common in these poorly nourished mothers. Love, E.J. and R.A.H. Kinch, "Factors Influencing Birth Weight in Normal Pregnancy," 91 *American Journal of Obstetrics and Gynecology*, 342-347 (1965).

These studies are substantiated by the National Academy of Sciences in its comprehensive review of the literature and research, *Maternal Nutrition and the Course of Pregnancy* (1970) pointing out at p. 3 that "poorly nourished women who have poor diets during pregnancy tend to have more complications than do well nourished women who have good diets during pregnancy." The Academy went on to discuss the high risk to impoverished families of serious difficulties during pregnancy and the increased incidence of low birth weight and associated mental retardation of the infant.

The net result of the consistent findings of the studies is well summarized in an obstetrical journal article:

> "Although it has long been acknowledged that the potential influence of maternal nutrition on the course and outcome of pregnancy is profound, only recently has the full significance of this concept begun to be accepted, and with the realization that the future health of mankind depends, to a very large degree, on nutritional foundations laid down during prenatal life."
>
> Pitkin, Roy M., Harold A. Kamietsky, Michael Newton, and Jack A. Pritchard, "Maternal Nutrition: A Selective Review of Clinical Topics," 40 *Journal of Obstetrics and Gynecology* 773 (1972).

Thus, in viewing respondents' regulations, the cost in human potential must be carefully weighed against whatever short term economic considerations have been asserted to justify petitioners' "in-kind income" claims which severely reduced the amount and quality of nutrition available to pregnant women and their unborn children.[2] In the proper administration of government the balance plainly weighs against such regulations.

---

2. In hearings before the California State Senate Subcommittee on Nutrition and Human Needs, physicians testified to the false savings generated by AFDC "in-kind income" deductions. In summary, they said that the savings of no more than $45 per month a maximum of $405 over a 9 months period) must be weighed against the potential costs of intensive newborn medical care for infants who are low birth weight or otherwise damaged at birth (these costs—paid by the State's Medicaid program—range from $150-$200 per day for a period of weeks, p. 35, 75-76), the cost of extended neonatal and pediatric management, and the cost of maternal complications of inadequately nourished pregnancies. (*Hearings: AFDC Grant Cuts to Pregnant Women,* October 4, 10, 26 and November 29, 1972," Subcommittee on Nutrition and Human Needs, California Senate Health and Welfare Committee, Transcript of hearings on October 4 and 10, 1972.)

Finally, Amici would note that most expensive of all are the increased costs of education for children who, because of complications during pregnancy, suffer either mild or severe forms of mental retardation.

> "*[E]ven the most sophisticated and expensive compensatory education cannot restore a poor child's ability to compete intellectually on equal terms if that child's potential for intellectual development has been irreversibly impaired by malnutrition.*" (emphasis in original); *Malnutrition, Learning and Behavior,* Papers of the Conference on Malnutrition, Learning and Behavior (MIT Press, 1970).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari to the Supreme Court of California should be denied.

Respectfully submitted,

GEORGE R. MOSCONE
ROBERT M. TEETS, JR.
STEVEN M. FLEISHER
Attorneys for Amici

By STEVEN M. FLEISHER

October 14, 1974

Participating in the preparation of the brief:
Audrey T. Cross
Assisted by:
E. Julia Barfoot

In the Supreme Court of the United States

OCT 23 1974
MICHAEL RODAK, JR., CLERK

OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
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DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WALTS, et al., *Respondents.*	NO. 74-312

Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

ROSALYN M. CHAPMAN
Western Center on Law and Poverty
P.O. Box 24795
Los Angeles, California 90024

ARTHUR L. MEADER III
Shasta County Legal Aid Society
1607 East Street
Redding, California 96001

RALPH SANTIAGO ABASCAL
MARJORIE GELB
San Francisco Neighborhood Legal Assistance Foundation
1095 Market Street, Suite 302
San Francisco, California 94103
Telephone: (415) 626-3811

Attorneys for Respondents

SORG PRINTING COMPANY OF CALIFORNIA, 348 FIRST STREET, SAN FRANCISCO 94105

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OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
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DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WAITS, et al., *Respondents.*	NO. 74-312

Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

PRELIMINARY STATEMENT

The principal issue in these three cases is common to and determinative of each case. Therefore, we have chosen to submit a consolidated Brief In Opposition pursuant to Rule 23(5). Respondents in all three cases have common counsel. Respondents hope that this procedure will not only enhance the Court's understanding of the issues, but will also conserve its time.

Initially, respondents discuss the common issues in Point I. Then in Point II we discuss those issues that are peculiar to one or two (but not all) of the cases. Finally, we discuss Petitioners' basic claim that the construction of state law by the Court below in each of the three cases renders the state AFDC plan out of conformity with federal law. We suggest that there is no present need for the Court to address itself to these issues and that the Court should await a determination of nonconformity by the agency principally responsible for such determinations, the U.S. Department of Health, Education and Welfare.

REASONS WHY THE WRITS SHOULD BE DENIED

I. Petitioners' "Noncash Economic Benefit" Policy Is Completely at Variance with This Court's Concept of the AFDC Flat Grant.

In the mid-1960's, HEW began encouraging the states to simplify their AFDC standards of need.[1] Until this time standards of need were computed on a highly individualized basis attempting to recognize the peculiar circumstances of each family. One result was that the need standards were exceptionally complicated and difficult to use, even for experienced caseworkers. In one sense, these individualized need standards expressed a preference for individual equity over administrative efficiency. These highly individualized systems were also criticized as placing too much discretion, and therefore, power subject to abuse, in low-level welfare workers. This tended to degrade recipients because it made them particularly vulnerable to behavior control tendencies in some social workers. *Rosado v. Wyman* (E.D.N.Y. 1969)

1. The "standard of need" is "a yardstick for measuring who is eligible," *Rosado v. Wyman* (1970) 397 U.S. 397, 408. *See* Gladys O. White, "Simplified Methods For Determining Needs," U.S. Dept. of HEW (1964).

304 F. Supp. 1356, 1369, *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

Simplification, therefore, was viewed as a means for enhancing individual dignity, *viz.*, and "as an advance in administrative efficiency." *Rosado v. Wyman* (1970) 397 U.S. 397, 417; *see further, id.*, 416-17; *id.*, O.T. 1969, No. 540, Memorandum For The United States As Amicus Curiae, 10-11. The most extreme form of simplification is one in which all the diverse elements of an individualized system are consolidated by a statistically weighted averaging. The result is a single sum applicable to all families of a given size. This is called a "flat grant maximum" system. *Rosado v. Wyman, supra*, 397 U.S. at 417.

These cases present the principal question of whether a state, after averaging the needs of all recipients under an individualized system—high need, low need and all in between—*must thereafter* continue to treat low-need families on an individualized basis. A highly simplified example will put this question in its proper perspective.

Assume that a hypothetical state had three AFDC families with four recipients in each family. Under its individualized needs system, family A's monthly needs were determined to be $200, family B's, $250, and family C's, $300. If the state converted to a flat grant system, the flat grant would be $250. Must the state then pay B and C $250 but pay A only $200 since A's needs are still only $200? That is what petitioners contend in the three instant cases.

A. IN 1971, CALIFORNIA CONVERTED FROM AN INDIVIDUALIZED AFDC PAYMENT SYSTEM TO A FLAT GRANT.[2]

To fully understand the respective contentions of the parties, a brief review of the California AFDC payment struc-

2. The most extensive exposition of the statutory background by the Court below is in *Swoap v. Cooper*, Pet., App., 5-13.

ture is necessary. Prior to 1971, families of equal size received greater or lesser grants depending upon several variable factors: (1) the age of each child; (2) the sex of each child; (3) the county of residence; (4) the number of adults (one or two) in each family; (5) the *actual* expenditures for rent (however, *actual* expenditures were recognized only up to specified maximums which varied according to the size of the family and further varied according to the county of residence); and (6) whether or not a child was unborn or in being. These factors, and the amounts applicable to each, had long been established by administrative regulations of the Director of the state welfare agency.

When a family applied for AFDC (and every month after a family was determined eligible), the pertinent factual circumstances of *each* family would be determined in order to apply each of the foregoing factors. When this review was completed, the result was called the family's "need". This system resulted in considerable variation.[3] For example, an AFDC mother residing Sacramento County with her three daughters, all of whom were under six years of age, would have total monthly needs (exclusive of housing) of $183.30. On the other hand, a mother living with three teenage sons in Sierra County would have a similar monthly needs figure of $305.05. Assuming that both paid rent equal to the applicable maximums for four-person housing in their counties ($120 and $110, respectively) total needs would be $303.30 and $415.05.

After the "needs" computation was completed, the family's income would be computed and the total subtracted

3. *Cf., Rosado v. Wyman* (E.D.N.Y. 1969) 304 F.Supp. 1356, 1365-67, *rev'd on other grounds,* 414 F.2d 170 (2d Cir. 1969), *rev'd* 397 U.S. 397 (1970).

from total "need." The difference, called "unmet need", would then be paid as an aid grant.[4] Thus, there was wide variation in aid grants to families of equal size. If each of the four-person families in the foregoing example had a monthly income of $200, the Sacramento County family would receive a grant of $103.30 while the Sierra County family would receive $215.05.

An important aspect of this system was that any attempt to reduce housing expenditures, and to reallocate the resulting savings to other needs such as food or clothing, would be futile. The move to cheaper housing would be met with a *pro tanto* decrease in grant. In each of the foregoing examples, a $25 monthly reduction in rent would reduce the grant by a full $25 (to $78.30 and $90.05, respectively).

In August, 1971, the California Legislature enacted the Welfare Reform Act of 1971. Among its many provisions, the Act "replaced this cumbersome system," *Swoap v. Cooper*, Pet., App., 5, with a flat grant system by completely rewriting the grant payment statutes, Welf. & Inst. Code §§ 11450(a) and 11452.[5] "The chief purposes . . . were to streamline the administration of the welfare program and to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities." *Id.*, App., 6.

> "The Legislature abolished the administrative allowances and need figures and took upon itself the tasks

4. In certain cases of high "needs" and little or no income, "unmet need" might exceed statutorily imposed maxima which varied only according to family size. In such case, "unmet need" would be paid only up to the statutory maximum.

5. The former versions are set out in *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 449, nn. 6, 8. The present grant statute, § 11450, is set out in *Swoap v. Cooper*, Pet., App., 45-47. The present needs statute, § 11452, is set out in Exhibit "1" hereto.

of determining the minimum need level of recipients (Welf. & Inst. Code § 11452). The Legislature itself then set *uniform welfare payments* (Welf. & Inst. Code § 11450) *based on a fair averaging of all AFDC grants,* a method of welfare benefit computation recently approved by the United States Supreme Court in Rosado v. Wyman (1970) 397 U.S. 397." *Id.,* 5-6 (emphasis in original).

Unlike its predecessor, the new § 11450 no longer looked to the "needs" of any particular family in computing a grant.[6] The process became far, far simpler: the grant to *any* and *every* family would be the difference between available income and a statutorily fixed amount based *solely* on the number of eligible, needy persons in the household. The touchstone is that *all families of equal size are to be treated equally.*

The method by which the new amounts in §§ 11450(a) and 11452 were derived was simple arithmetic averaging of the varying amounts received by families of equal size under the prior method. *Swoap v. Cooper,* Pet., App., 11. True, payment of the same amounts to all families of equal size may mean that some are able to cope more easily than others. (Consider an AFDC mother with three infant children compared to another with three teenagers.) But this is simply the result of averaging. As this Court has ob-

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6. The "needs standard" statute, § 11452, uses the term, "minimum basic standards of adequate care" for "needs." The amounts applicable to families of specified size are set forth in the statute. These amounts are relevant only to *initial* eligibility. See *Rosado v. Wyman* (1970) 397 U.S. 397, 408; *Villa v. Hall* (1972) 7 Cal.3d 926, 928, *on remand from Hall v. Villa* (1972) 406 U.S. 965.

The "grant" statute, § 11450(a), specifies that "there shall be paid, notwithstanding minimum basic standards of adequate care . . . an amount of aid each month which when added to . . . income . . . is equal to the sums specified in the following table. . . ." (Emphasis added.)

served, "obviously, such averaging may affect some families adversely and benefit others." *Rosado v. Wyman, supra,* 397 U.S. at 419. Thus, as in every averaging, all those families that were receiving *more* than the average under the old system *lost* benefits while those formerly receiving *less* than the average gained thereby. *See further, Rosado v. Wyman, on remand,* (E.D. N.Y. 1970) 322 F.Supp. 1172, 1189.

5. AFTER THE CALIFORNIA LEGISLATURE ADOPTED A COMPREHENSIVE FLAT GRANT SYSTEM, PETITIONERS ADOPTED POLICIES REDUCING GRANTS TO CERTAIN FAMILIES WHO SHARED HOUSING WITH OTHER PERSONS CONTENDING THAT SUCH FAMILIES HAD LOWER NEEDS. SUCH A POLICY VIOLATES THE FUNDAMENTAL LOGICAL AND MATHEMATICAL PREMISE OF A FLAT GRANT.

Three classes of "gainers" in the averaging process are those represented by the respondents in each of the three Petitions before the Court. After the Welfare Reform Act of 1971 became effective, petitioner SWOAP's predecessor issued a series of regulations which reduced the grants otherwise payable to these several categories of "gainers."

First, a regulation, EAS § 44-115.9, was adopted establishing "allowances" for rent, utilities, food and clothing which varied according to family size. (See *Brian v. CWRO,* Pet., App., 34-35 where the regulation is set out in full.) Then, three other regulations, those here at issue, were adopted which established three slightly varying schemes to utilize this basic regulation to bring about grant reductions.

1. The "Flat Grant" in Swoap v. Cooper.

The principal case of this trilogy, *Swoap v. Cooper,* involves EAS § 44-115.8. It applies when any AFDC "child resides with an adult aid recipient. . . ." *Id.,* Pet. 3. An "adult aid" recipient is defined as recipient of the benefits

of the three "adult" public assistance programs under the Social Security Act of 1935.[7] For example, an AFDC mother and her two children may share housing with the children's elderly grandmother. Assume that in such a case the total rent and utility costs were $100. The regulation then requires that the *pro rata* share of the *actual* housing and utilities costs of the AFDC unit, $75, be compared to the EAS § 44-115.9 "allowance." For an AFDC family of three, the "allowance" is $104. *Brian v. CWRO,* Pet., App., 34. Thus, the "allowance" exceeds the *pro rata* share by $29. "[I]f the allowance exceeds the [*pro rata*] share of the *actual* cost of housing and utilities (including telephone), then the excess shall be countable against the . . . maximum aid payment *as income.*" *Swoap v. Cooper,* Pet., 3-4 (emphasis added). In this example, the amount of "income" is $29. Thus, assuming no "real" income, the otherwise payable grant of $235 would be reduced to $206.

The asserted rationale for this policy is that these families do not "need" as much as families who are not sharing housing and utilities with an "adult aid" recipient. The amounts that the latter families "need" is set forth by regulation in EAS § 44-115.9; those amounts represent the average *actual* expenditures of those families for housing and utilities.[8]

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7. Old Age Assistance (OAA), title I, 42 U.S.C. §§ 301-06, Aid to the Blind (AB), title X, 42 U.S.C. § 1201-06 and Aid to the Totally and Permanently Disabled (ATPD), title XIV, 42 U.S.C. §§ 1351-55; each of these programs has been succeeded by the new combined federally administered income maintenance program for the aged, blind and disabled, the Supplemental Security Income (SSI) program, P.L. 92-603, §§ 301-03, 86 Stat. 1465-78, 42 U.S.C. §§ 1381-83c.

8. The factual derivation of EAS § 44-115.9 is discussed in *Swoap v. Cooper,* Pet., App., 24, n.2 (Burke, J., dissenting).

The basic flaw with such an approach is that it attempts to preserve the cake while at the same time strives to consume it. In short, it exacts a double penalty. An average, by definition, reflects the individualized needs of "high need" and "low need" families. Thus, after an averaging, "high need" families are penalized since they received a higher grant before the implementation of a flat grant system.

Curiously, all of the litigation over the conversion to flat grants by several states following this Court's *Rosado* decision involved challenges by "losers" in the averaging process complaining of the inclusion of "gainers" in the striking of the average. Generally, these litigants objected to the inclusion of families whose rental needs had been determined (as in California) on an "as-paid" basis and: (1) who lived in public housing and who therefore paid artificially low rents, *New Jersey Welfare Rights Organization v. Cahill* (D.N.J., 1972) 349 F.Supp. 501, 511, *aff'd*, 483 F.2d 723, 727 (3rd Cir. 1973), *Roselli v. Affleck* (D.R.I. 1974) 373 F.Supp. 36, 44-45; (2) who paid no rent at all, *Johnson v. White* (D.Conn. 1972) 353 F.Supp., 69, 78; (3) who lived in rural areas and paid lower rents in comparison to urban areas, *New Jersey Welfare Rights Organization v. Cahill, supra,* 349 F.Supp. at 511; or, (4) who shared lodging with other non-AFDC persons, *id.*, 75, 77-78, *Roselli v. Affleck, supra,* 373 F.Supp. at 46-47. In each case, the courts held that there was nothing legally improper in such a method because such a result was inherent in the nature of the statistical process. As the Third Circuit said in *New Jersey Welfare Rights Organization v. Cahill, supra,* 483 F.2d at 727:

> "The thrust of these arguments is that any averaging process is 'unfair' to many welfare recipients. While

> it is conceded that the result of averaging may reduce welfare payments to many families and increase the grants to others, [42 U.S.C.] § 602(a)(23), as interpreted by *Rosado* [397 U.S. 397] does not proscribe such a result."

Now, however, petitioners seek to enforce a double penalty by recognizing only the reduced needs of "lower need" families which have already been recognized in the establishment of the average. The Court below concluded that the imposition of this double penalty was inconsistent with the intent of the California Legislature in establishing a flat grant system:

> "In calculating the various flat grant figures included in the schedule of section 11450, the Legislature averaged the diverse needs of *all* AFDC recipients; this averaging took into account the savings accruing to some recipients because of shared housing, as well as the many factors, such as specialized housing or utility needs, which resulted in higher housing costs for other recipients." *Swoap v. Cooper,* Pet., App., 11 (emphasis in original).

Of course, there is nothing that requires a state which adopts a "flat grant" approach to include *all* needs in the averaging process or to include all variations of a particular need. For example, all needs could be averaged *except* housing, which could continue to be allowed "as paid". This would result in lower grants to those who share housing.[9] Or, the housing needs of only those families which had been living in independent living arrangements could be averaged; those in shared housing arrangements could continue to be treated individually. Petitioners contended below that this is what was done in California. However, based upon exhaustive analysis of the legislative history, the Court

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9. Or for those who live in public housing, or who live in rural areas, or who have free housing.

below concluded that "there is absolutely nothing to support such a contention." *Swoap v. Cooper,* Pet., App. 11, n. 13; *see also, id.,* 8-10. The Court below therefore held that "[b]ecause the effects of shared housing have already been considered in establishing the basic grant figures . . . the challenged regulations [EAS § 44-115.8] . . . would impose an unfair 'double deduction' on AFDC recipients who happen to share a household with a recipient of adult aid." *Id.,* 11-12.

2. The "Flat Grant" In Brian v. California Welfare Rights Organization.

The circumstances of the second case in the trilogy, *Brian v. CWRO,* also involved another category of "gainers" in the averaging process, families with unborn children. Since 1949, California has defined the term, "needy child", to include an unborn child; there is no disagreement between the parties on this score.[10]

Prior to the 1971 conversion to a flat grant, the existence of an unborn child increased the family's "needs" by only a flat $21 per month. *Brian v. CWRO,* Pet., App., 4. This amount was less than would be the result if the child was in being because all of the other variable need factors (age, sex, county of residence, etc.) were inapplicable to this special situation. Therefore, after the averaging process leading to the flat grant, this class of families would tend to be "gainers". Upon conversion to the flat grant, the unborn child was treated for grant computations as equivalent to a child in being. Thus, prior to her pregnancy, respondent SHELTON, her husband and their young son, Christopher, consisted of a three person family eligible for a

10. Thus, this case does *not* present the Court with the question of whether or not 42 U.S.C. § 606(a) requires inclusion of unborn children. *Cf. Alcala v. Burns,* U.S. Sup. Ct., O.T. 1973, No. 73-1708; *Doe v. Lukhard,* U.S. Sup.Ct., O.T., 1973, No. 73-1763; *Carver v. Hooker,* U.S. Sup.Ct., O.T. 1974, No. 74-242.

three-person family grant of $235 monthly. In early April, 1972, respondent SHELTON became pregnant; her family thereafter consisted of four persons eligible for the full four-person $280 grant as if the child she was carrying was in being.

Later in May, 1972, petitioner SWOAP's predecessor implemented a policy whereby an unborn child was considered to be receiving free rent and utilities owing to its residency within its mother's womb. The full "in-kind income allowances" of EAS § 44-115.9 for these items of need for one person were computed. The total was $67.[11] This was subtracted from the four-person grant of $280 thus leaving the family with just $213, $22 *less* than the $235 the family received *before* respondent SHELTON became pregnant. In July, 1972, the policy was changed so that the "in-kind income" would equal the increment to the next higher-person grant level; in the case of the SHELTON family, that increment is $45 ($280-235). In effect, the unborn child would no longer be recognized as eligible for a grant although this result would be reached after traveling an unusual, albeit imaginative, route.

On August 10, 1972, this action was commenced as an original mandamus proceeding in the California Court of Appeal seeking that Court's discretionary assumption of jurisdiction pursuant to Art. VI, § 10 of the California Constitution. One argument asserted was that both state and federal law required inclusion of an unborn child in the family grant (the federal law arguments were similar to the arguments made by the recipients in the cases cited in n. 10 *supra*) and that the "in-kind income" notion completely thwarted the policies inherent in such requirements. Secondly, it was asserted that the "in-kind income" notion

11. This total is less than the amounts in the version of EAS § 44-115.9 set forth in *Erian v. CWRO*, Pet., App., 34, since the amounts have been updated since May, 1972.

was fundamentally at odds with the principle of a flat grant since the lower need families with unborn children under the pre-1971 scheme were in fact included in the averaging process. Six days after the action was filed, a regulation, EAS § 44-115.95, was adopted which again changed the details of computing the precise amount of "in-kind income". (It is set forth in *Brian v. CWRO*, Pet., App., 32.) Henceforth, it was determined by the incremental values expressed in the "allowances" regulation, EAS § 44-115.9, of a family equal in size to the members in being compared to a family with one or more person. (See *Brian v. CWRO*, Pet. App. 13, for an actual application of the new process in operation using the circumstances of the SHELTONs.) Because of the mathematical relation of the values in EAS § 44-115.9, the amount of the "in-kind income" in all cases would be such that a family would have a $10 grant increase whenever an AFDC mother became pregnant.

Respondents contended that this practice was completely at variance with the fundamental mathematical premise of a flat grant: some gain and some lose but all families of equal size whose individual circumstances were taken into consideration in striking the average are to receive the same grant amount. Petitioners replied with the contention that the economic benefit of the prenatal lodgings constituted "income" or "resources" which, pursuant to state and federal law *must* be subtracted from the maximum grant. Without directly addressing respondents' arguments on the nature of a flat grant, the Court below rejected petitioners' "income" or "resources" contentions as wholly unsupported by state or federal law. *Brian v. CWRO*, Pet., App., 7-8.[12]

12. The Court in its subsequent opinion in *Cooper*, which does treat the flat grant issues, recognized the flat grant issue as common to *Brian v. CWRO*. *Swoap v. Cooper*, Pet., App., 1, n.1. *See also, id.*, 16, n.16.

3. The "Flat Grant" in Swoap v. Waits.

Similarly, the *Waits* class of children is another group of "gainers" in the averaging process; they are children who have been orphaned or abandoned and who are not living with their parents, but are living with "non-needy caretaker relatives."

To be a "caretaker relative," one must be a person related to the child to the degree specified in § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such as a grandmother, aunt, brother, etc. To be "non-needy" the income and resources of such relatives must be in excess of the increment in the income limit applicable to a family equal in size to the children in question *plus* the non-needy caretaker relatives. For example, respondent BROWN and his wife are the caretaker relatives of their two minor nieces and nephew. The income limit applicable to the three children is $235 per month. If the BROWNs are added, the family becomes a five-person family with a grant of $331. Hence, if the BROWNs' own income exceeds $96 per month ($331 —235) they are considered to be "non-needy" and therefore are not eligible for a grant.

Prior to the 1971 conversion to the flat grant, children living with non-needy caretaker relatives had their housing needs computed on the same basis as children living with recipients of "adult aids," i.e., the *Cooper* class. That is, their housing needs were equal to their *pro rata* share of the household's total shelter costs, limited only by the maximum allowances applicable to a family of equal size. *Swoap v. Waits,* Pet., App., 5, n. 5.

For example, if four needy dependent children were living with their non-needy aunt and uncle in Sacramento County, and the total household shelter costs were $150, the children's *pro rata* share would be $100 (two-thirds of $150). This full amount would be allowed as shelter need since it would be below the limit for a four-person family.

The average needs of the class would tend to be less than those applicable to families of equivalent size living independently since the latter do not enjoy the "economies of scale" which exist when housing is shared. Thus, this class of children would tend to be "gainers" in the averaging process.

Upon conversion to the flat grant in 1971, the newly adopted regulation challenged herein, EAS § 44-115.611 (set out in *Swoap v. Waits*, Pet., App., 26), brought about substantial grant reductions to the *Waits* class of children. The reasoning underlying this regulation is as follows:

1. These children are "less needy" than other children because they receive free rent and utilities from their non-needy caretaker relatives;

2. The rent and utilities they receive are free because, as the Court below held, the regulation *"conclusively presumes* that such relatives, by agreeing to take such children into their homes, are both willing and able to provide the children with free housing and utilities." *Id.*, at 6 (emphasis in original).[13]

3. Accordingly, the full value of the housing and utility "allowances" of EAS § 44-115.9 is to be subtracted from the applicable grant maximums.[14]

This brought about substantial grant reductions. For example, respondent LUCEY's grandchild's monthly grant was reduced from $115 to $48; the three children living with

13. The conclusive nature of this presumption is treated separately below. Basically, respondents contend that it violates both a federal regulation as well as the Due Process Clause of the Fourteenth Amendment.

14. The effect was mitigated slightly if, and to the extent that, the presence of the children caused increases in the cost of housing and utilities. For example, if larger quarters had to be obtained or if the children used more water than otherwise.

respondent BROWN had their $235 grant reduced to $140; and, respondent WAIT's three grandchildren and three great-grandchildren had their $360 grant reduced to $259.

The Court below held that EAS § 44-115.6, which brought this all about, was:

> "simply another variation on the department's 'non-cash economic benefit' theme, a theme which, as explained in *Cooper*, is fundamentally incompatible with the 'flat grant' system of welfare benefits adopted by the Legislature in 1971. Thus, although the instant regulation seeks to reduce welfare payments on the basis of reduced housing and utility needs of recipients living with non-needy relatives, such reduced needs, if they in fact exist, have already been taken into account by the Legislature in computing the flat grant figures of section 11450. Consequently, if approved, the challenged regulation would in reality effect an improper 'double deduction' of welfare benefits for those recipients who happen to live with non-needy relatives." *Id.*, at 5.

C. PETITIONERS' CONTENTION THAT THE "NONCASH ECONOMIC BENEFITS" MEASURED BY THEIR REGULATIONS CONSTITUTE "INCOME" WITHIN THE MEANING OF SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT IS WHOLLY UNSUPPORTED BY THE STATUTE, ITS LEGISLATIVE HISTORY OR THE THIRTY-FIVE YEARS OF ADMINISTRATIVE PRACTICE UNDER THE STATUTE.

In each of the three cases, petitioners had one basic response to the argument that individualized treatment of classes of "gainers", after conversion to a flat grant, violated the fundamental logical and mathematical premise of such a grant system. Petitioners said that notwithstanding the California Legislature's intention that these classes of recipients receive *full* grants, the supervening will of Congress embodied in § 402(a)(7) of the Social Security

Act, 42 U.S.C. § 602(a)(7),[15] rendered the State Legislature's will nugatory.[16]

Petitioners place primary reliance upon the § 402(a)(7) phrase "income and resources". Great emphasis is placed upon the contention that *all* "income and resources" must be considered. This point we readily concede; that is not the question. The question is whether these "noncash economic benefits" were intended by Congress to be "income and resources" in 1939 when the statute was enacted. *See* Act of Aug. 10, 1939, c. 666, § 401, 53 Stat. 1379. There is a very good reason why petitioners have not cited to this Court (or to any of the courts below) pertinent legislative history, HEW regulations (or other agency policy statements), case authority or another state's practice. The reason is that none of these exist. Petitioners argue, *ex cathedra,* that these "noncash economic benefits" are "income" or "resources" (always using the terms interchangeably) when the four-decade history of the public assistance titles of the Social Security Act demonstrates only that these notions have *always* been treated, if treated at all, as aspects of a "need" determination, not as an "income" or "resource" concept.

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15. The section provides that:
"(a) A state [AFDC] plan . . . must: . . .
"(7) . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of a child claiming [AFDC] . . . in determining the need of the child . . . claiming such aid. . . ."

16. Petitioners also made an alternative argument that these "noncash economic benefits" were income as a matter of *state* law. In each case, the arguments were rejected. *Swoap v. Cooper,* Pet., App., 13-17; *Swoap v. Waits,* Pet., App., 6; *Brian v. CWRO,* Pet., App. 7-8. Obviously, these interpretations of state law are not at issue before this Court. *Cramp v. Board Public Instruction* (1961) 368 U.S. 278, 281; *Henry v. Mississippi* (1965) 379 U.S. 443, 446-47.

As noted above, the touchstone of a flat grant system is that a family's grant is computed without regard to that family's *individual* needs. Since the California Legislature had withdrawn the power from petitioners to adopt regulations establishing needs, lower needs can no longer form the rationale for a lower grant. In order to circumvent this barrier, "needs" concepts were transmuted by petitioners into the concepts of "income" or "resources" by mere regulatory fiat. The Court below said in response:

> "The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortued concept of 'income' in an attempt to camouflage an impermissible administrative reevaluation of AFDC recipients' needs. An analysis of the complexities of the department's novel determination of 'income' is reminiscent of a journey into the fictional realms visited by Alice through the looking glass. In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, 'When I use a word, it means just what I choose it to mean—neither more nor less.'" *Swoap v. Cooper*, Pet., App., 21.

Petitioners' sole argument[17] in support of their contention that these "noncash economic benefits" are "income and resources" rests upon an analogy to § 1612(a)(2)(A) of the Social Security Act, 42 U.S.C. § 1382a(a)(2)(A).[18] That

17. In each of their petitions, petitioners also quote out of context two sentences from this Court's recent opinion in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup. Ct. 1746, 1754. These two sentences merely state what respondents have repeatedly conceded: income must be determined *individually* and *all* income must be considered. The Court in *Shea* was not assaying the question of what is or is not income. That is the question that these cases raise.

18. In each of their Petitions, this statute is erroneously cited as 42 U.S.C. § 1382(a)(2)(A).

statute, first enacted on October 30, 1972, Public Law 92-603, § 301, 86 Stat. 1468, provides that an aged, blind or disabled recipient of Supplemental Security Income (SSI) benefits, who is "living in another person's household and *receiving* support and maintenance in-kind from such person" (emphasis added) shall be subject to a grant maximum which is one-third lower than otherwise "in lieu of including such support and maintenance in the unearned income of such individual. . . ." In other words, instead of making a determination of the actual cash value of "support and maintenance" (defined as "room and board," 20 C.F.R. § 416.1125(a), 38 Fed.Reg. 27406, Oct. 3, 1973; 39 Fed. Reg. 3674, January 24, 1974) in each case, a mechanical one-third grant reduction is made in all cases. But this rule applies only when an SSI recipient is *receiving* support and maintenance from another. It does *not* apply when an SSI recipient is *sharing* housing with another and enjoying the noncash economic benefits of economies of scale which exist when housing is shared. In that case, the recipient is *not* considered to be *receiving* anything from his or her roommate. Social Security Admin., CLAIMS MANUAL § 12237(b). It is that analogy which is most appropriate to the instant cases, an analogy wherein no "in-kind income" is considered to exist.

One important point should be made clear. Respondents have no quarrel with the notion of in-kind income. For example, a recipient who is given a TV set that has a market value of $200 receives in-kind income of $200 since the property can be converted to cash. Under the Internal Revenue Code, it is only when goods or services are received which have a fair market value that the value must be included as income. 26 C.F.R. § 1.61-2(d). An individual who saves on rent by sharing housing is not taxed on the

amount of the savings. The Court below pointed out this distinction as follows:

> "[U]nlike true 'in-kind income', the department's 'economic benefit' concept does not reflect *actual* income (commodities or cash) received by a recipient, but instead attributes 'constructive' income to a recipient who, through such economizing conduct as sharing housing, manages to spend less money monthly than the department's hypothesized average. A recipient who saves on housing costs by sharing a household with others, and who in the department's eyes thereby realizes 'noncash economic benefits,' is a far cry from a recipient who receives free housing (i.e., actual 'in-kind income income') or cash from a willing and able donor." *Swoap v. Cooper,* Pet., App., 20, n. 19 (emphasis in original).

In short, petitioners can point to absolutely nothing in federal or state law, other than the *ex cathedra ipse dixit* emanating from their regulatory pen, that *compels* California to evaluate the "noncash economic benefit" that flows from shared housing and to deduct the assigned value as income from AFDC grants.

II. Other Issues Not Common to the Three Cases.

In addition to those issues discussed above which are common to all three cases, the Court below passed upon several other issues which present federal questions. The analysis of these issues demonstrates that the rulings below do not bring California's AFDC plan into conflict with federal law but instead they bring it into conformity with that law.

These other issues only involve *Swoap v. Cooper* and *Swoap v. Waits.* First we will address an issue common to them both and then issues unique to each.

A. EVEN IF THE "NONCASH ECONOMIC BENEFITS" OF SHARED HOUSING COULD PROPERLY BE CONSIDERED "INCOME," THE REGULATION WHICH MEASURES ITS VALUE IS INVALID SINCE IT DOES NOT MEASURE THE ACTUAL VALUE; INSTEAD, IT ASSIGNS A FICTIONAL, STANDARDIZED VALUE THAT VIOLATES FEDERAL LAW.

Assuming that the "noncash economic benefit" of shared housing must be considered to be income under § 402(a)(7), EAS § 44-115.9 is invalid since it does not measure the *actual* value to the recipient in the individual case. Rather, it uses a standardized value applicable in all cases in complete disregard of the individual circumstances of each case. (It is based upon a 1970 survey; see *Swoap v. Cooper,* Pet., App., 24, n. 2.) HEW's regulations provide that "only such net income as is *actually available* for current use on a regular basis will be considered. . . ." 45 C.F.R. § 233.20(a)(3)(ii)(*c*) (emphasis added).

The Court below properly applied this rule and this Court's recognition in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup.Ct. 1746, 1753-54, that income must be individually determined, and held that:

> "No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient. Only the *actual value* . . . could possibly constitute income to the recipient, and this the regulation does not measure." *Swoap v. Cooper,* Pet., App., 19 (emphasis in original); *see also, Swoap v. Waits,* Pet., App., 8-9.[19]

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19. *Cf., Barron v. Bellairs,* ..... F.2d ....., No. 74-1210 (5th Cir., June 28, 1974) which held invalid under the same rule a Georgia regulation requiring the averaging of the past six months' child support payment in lieu of the actual amount.

B. ALTHOUGH NOT PASSED UPON BY THE COURT BELOW IN SWOAP V. COOPER, THE REGULATION AT ISSUE ALSO VIOLATES 42 U.S.C. § 602(a)(24) AND THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

The *Cooper* regulation, EAS § 44-115.8, becomes operative only when an AFDC family is living with an SSI recipient.[20] A 1972 amendment to the AFDC title of the Social Security Act provides that:

> "if an individual is receiving benefits under subchapter XVI of this chapter [SSI], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter [IV-A] and his income and resources shall not be counted as income and resources of a family under this subchapter." 42 U.S.C. § 602(a)(24), P.L. 92-603, § 414(a), 86 Stat. 1492.

On December 20, 1973, after the case was *sub judice* in the California Supreme Court, HEW interpreted 42 U.S.C. § 602(a)(24) to mean that "the need, income, resources and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home." (See Exhibit "2" attached hereto.) This provision, standing alone, clearly renders EAS § 44-115.8 invalid. Under this Court's longstanding *Schooner Peggy* doctrine, 42 U.S.C. § 602(a)(24) should be applied by this Court although it was not considered below. *See Bradley v. School Bd. of Richmond* (1974) ..... U.S. ....., 94 Sup. Ct. 2006, 2016-21.

EAS § 44-115.8 is also invalid under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it applies only when an AFDC family is

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20. The regulation uses the term "recipients of adult aids." When written, it referred to recipients of OAS, AB and APTD; the term was not changed when these programs were replaced by the federally administered SSI program. *See supra*, p. 5, n. 7.

sharing housing with one or more SSI recipients. If three AFDC children live with their mother and their elderly grandmother, and the latter receives $235 per month from SSI, then it is operative. If, however, the grandmother receives $235 (or $335, or whatever) from Social Security (Title II of the Act) or Railroad Retirement benefits, or Unemployment Insurance, earnings, etc., it does *not* apply; if the grandmother herself is an AFDC mother, it does not apply; if an AFDC family shares housing with another AFDC family, it does not apply. There is simply no conceivable rational basis for such capricious classification and it is therefore invalid. *McGowan v. Maryland* (1961) 366 U.S. 420; *United States Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 538.

C. THE REGULATION AT ISSUE IN SWOAP V. WAITS CONCLUSIVELY PRESUMES THAT NON-NEEDY CARETAKER RELATIVES ARE WILLING AND ABLE TO, AND DO, PROVIDE FREE HOUSING AND UTILITIES TO THE AFDC CHILDREN RESIDING WITH THEM. IT THEREFORE VIOLATES HEW'S "ACTUALLY AVAILABLE INCOME" RULE AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Critical to an understanding of this issue is the fact that non-needy caretaker relatives, as contrasted with parents, have absolutely no legal duty to support the children that accidental misfortune or parental neglect have thrust upon them. Therefore, under this Court's decisions in *King v. Smith* (1968) 392 U.S. 309 and *Lewis v. Martin* (1970) 397 U.S. 552, EAS § 44-115.6 is violative of the "actually available income" rule of the Social Security Act because it assumes a donative intent when such intent may not *in fact* be present. There must be "proof of actual contributions." 45 C.F.R. § 233.90(a); see also, 45 C.F.R. § 233.20(a)(3)(ii)(*c*) and cases cited by the Court below in *Swoap v. Waits,* Pet., App., 6-8.

Although we have no doubt as to the applicability of the foregoing federal regulatory provisions, even if the Court were to decide that they were inapplicable, EAS § 44-115.6, nevertheless violates the Fourteenth Amendment's Due Process Clause because it establishes a conclusive evidentiary presumption of donative intent with no rational connection between the fact proved (children living with relatives who have no duty to support) and the fact presumed (donation of housing and utilities). *Vlandis v. Kline* (1973) 412 U.S. 441, 452; *Heiner v. Donnan* (1932) 285 U.S. 312, 328-30; *Mobile, J. & K.C. Ry. v. Turnipseed* (1910) 219 U.S. 35, 43-44.

III. There Is No Compelling Reason Why This Court Should Preempt the U.S. Department of Health, Education and Welfare from Making an Initial Determination Whether or Not California Law, as Construed by the Court Below, Violates Supervening Federal Law.

At the outset, the Court should be fully aware of the rather bizarre posture of petitioners before the Court. They are officers of the Executive branch of California government who claim that a state statute, which they are bound to enforce as the Legislature intended, and as the Governor signed, California Constitution, Art. 5, § 7, is invalid because it breaches federal law. This attack on state law is made on their behalf by the State's Attorney General, who is also bound to defend the State Legislature's will embodied in its enacted measures. Calif. Const., Art. 5, § 21.

The claim that state welfare statutes or regulations violate federal law is ordinarily made by those adversely affected, the state's welfare recipients. The claim is that the state law *deprives* them of rights conferred by the supervening federal law. No such claim is asserted here. Rather,

state welfare officials thrust the Excalibur of federal law through the shield of a state statute in order to *deprive* recipients of the benefits which the California Legislature strove to confer upon them.

If the rulings below truly do put California's AFDC plan out of conformity with federal law, how are petitioners injured thereby? The only conceivable injury would be the threat of termination of federal funds. Title 42 U.S.C. § 604 provides that if the Secretary of HEW determines that a state plan no longer conforms to federal law, he shall cease providing federal funds to that state. See *Rosado v. Wyman* (1970) 397 U.S. 397, 430-33 (Black, J., dissenting); *Arizona Dept. of Public Welfare v. U.S. Dept. of HEW* (9th Cir. 1971) 449 F.2d 456, 460-62, *cert. den.* 405 U.S. 919 (1972); 45 C.F.R. § 213. The Secretary's decision is then reviewable by the Court of Appeals and finally by this Court. 42 U.S.C. § 1316(3), (5). No termination would occur until the review process is completed.[21] Since those contributions to California now approach $700 million annually, such a consequence is not to be looked upon lightly. However, there is absolutely no indication that HEW shares petitioners' interpretation of § 402(a)(7) or that the agency intends to initiate termination proceedings.

In *Rosado v. Wyman* (1970) 397 U.S. 397, 425-26, this Court rejected New York's suggestion that welfare recipients should not be permitted to initiate judicial proceedings challenging state laws as violative of federal welfare

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21. Actual termination cannot occur in California since the California Legislature has provided a statutory mechanism whereby any offending provision of California law is automatically amended to reach conformity when HEW issues a "formal ruling" of nonconformity. Welf. & Inst. Code § 11003; *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 454-55.

law until HEW has passed on the question. However, the serious adverse consequences that would befall recipients, who were correct in their claims, if they were subject to the long delays inherent in such a primary jurisdiction bar are inapplicable when the claim of nonconformity is raised by state officials administering the alleged nonconforming state law. Because of the different interests in such a situation, the arguments in support of primary jurisdiction made by Mr. Justice Black in his dissent in *Rosado, supra,* 397 U.S. at 430-35, are particularly appropriate under these peculiar circumstances.

CONCLUSION

For each of the foregoing reasons we would suggest that the Court deny the Petitions for Certiorari.

Dated: October 11, 1974
San Francisco, California

Respectfully submitted,

RALPH SANTIAGO ABASCAL
MARJORIE GELB
ROSALYN M. CHAPMAN
ARTHUR L. MEADER III
Attorneys for Respondents

Exhibit 1

§ 11452. Minimum basic standards of adequate care

Minimum basic standards of adequate care shall be distributed to the counties and shall be binding upon them. Such standards are hereby determined on the basis of the schedule set forth in this section, as adjusted for cost-of-living increases or decreases pursuant to Section 11453, which schedule is designed to insure:

(1) Safe, healthful housing.

(2) Minimum clothing for health and decency.

(3) Low-cost adequate food budget meeting recommended dietary allowances of the National Research Council.

(4) Utilities.

(5) Other items including household operation, education and incidentals, recreation, personal needs, and insurance.

(6) Allowance for essential medical, dental, or other remedial care to the extent not otherwise provided at public expense.

(7) Other recurring special needs.

The schedule of minimum basic standards of adequate care is as follows:

Number of Needy Persons in the Same Family	Minimum Basic Standards of Adequate Care
1	$125
2	210
3	255
4	314
5	362
6	408
7	449
8	496
9	543
10	590

plus five dollars ($5) for each additional needy person.

The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this section.

(Added by Stats.1965, c. 1784, p. 4014, § 5. Amended by Stats.197 1,c. 578, p. ....., § 28.5, eff. Aug. 13, 1971.)

Exhibit 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Program Instruction
APA-PI-74-8
December 20, 1973

To: State Agencies Administering Approved Public Assistance Plans

SUBJECT: Need, Income and Resources of SSI Beneficiaries not to be Considered under Title IV-A

CONTENT: Section 414 of Public Law 92-603 amends the Social Security Act by adding Section 402(a)(24), effective January 1, 1973, and provides: "(24) if an individual is receiving benefits under Title XVI, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits under this title and his income and resources shall not be counted as income and resources of a family under this title."

This provision prohibits the inclusion of an individual receiving benefits under Title XVI, for the period for which such benefits are received, as a member of the AFDC assistance unit for purposes of determining need and the amount of the assistance payment under Title IV-A. It also prohibits the counting of income and resources of a beneficiary under Title XVI

as income and resources available to an assistance unit applying for or receiving assistance under Title IV-A.

A separate and independent computation for determining need and the amount of the assistance payment is required for AFDC assistance units when there are both Title IV-A applicants or recipients, and Title XVI beneficiary(ies) present in the same home. Computations for Title IV-A cases are not to include the needs, income or resources of Title XVI beneficiaries.

Under the provisions of 402(a)(24) State plans are to specify a method for the determination of need and the amount of the assistance payment which takes into consideration only the need, income and resources of the AFDC assistance unit and which does not include the need, income and resources of persons receiving benefits under Title XVI when they are in combined households.

In applying this provision contained in 45 CFR 233.20, the need, income, resources, and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home.

INQUIRIES

To: SRS Regional Commissioners.

Commissioner, Assistance Payments Administration